

1 LOTTI BLUEMNER  
2 *In Propria Persona*  
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USDC SDNY  
DOCUMENT  
ELECTRONICALLY FILED  
DOC #:  
DATE FILED: 4/2/2015

8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF NEW YORK

11 ERGO MEDIA CAPITAL, LLC; CEE  
12 GEE CEE, LLC and ERIK H. GORDON,

13 Plaintiffs,

14 v.

15 LOTTI BLUEMNER,

16 Defendant.

Case No.: 15 CIV 1377 (LGS)

**MOTION TO DISMISS ACTION FOR  
LACK OF PERSONAL JURISDICTION  
AND IMPROPER VENUE, OR, IN THE  
ALTERNATIVE, TO DISMISS OR  
TRANSFER THE ACTION FOR FORUM  
NON-CONVENIENS; MEMORANDUM  
OF POINTS AND AUTHORITIES IN  
SUPPORT THEREOF**

*[concurrently filed with Declaration of Lotti  
Bluemner in support of Motion to Dismiss]*

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21  
22 COMES NOW specially appearing Defendant LOTTI BLUEMNER, an  
23 individual ("Defendant BLUEMNER,") who requests, pursuant to Rule 12(b) of the  
24 Federal Rules of Civil Procedure, that this court dismiss this action against specially  
25 appearing Defendant BLUEMNER as this court lacks *in personam* jurisdiction over  
26 Defendant BLUEMNER and because this action was filed in an improper venue, or,  
27 alternatively, that this court dismiss or transfer this action based upon forum *non-*  
28 *conveniens*.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

This action arises out of allegedly improper conduct taken by Defendant BLUEMNER in connection with, or arising out of, her employment, and termination from her employment, with Plaintiffs ERIK H. GORDON (“Plaintiff GORDON”) and ERGO MEDIA CAPITAL, LLC (“Plaintiff ERGO,”) as Plaintiff GORDON’s Los Angeles based personal assistant. Plaintiff GORDON, ERGO, and CEE GEE GEE, LLC will hereinafter be collectively referred to as, “Plaintiffs.” In her role as Plaintiff GORDON’s Los Angeles based personal assistant, Defendant BLUEMNER was responsible for, among other things, maintaining and overseeing the upkeep and maintenance of Plaintiff GORDON’s Beverly Hills condominium, the three (3) cars he maintained there, and for arranging travel arrangements for Plaintiff GORDON, and his guests, into and out of Los Angeles. (*See* Complaint, Docket No. 1, ¶22.) (Declaration of Lotti Bluemner “Bluemner Dec.,” ¶6.)

Importantly, she performed no job duties in New York, as Plaintiff GORDON had another personal assistant, Travis Braha, who worked as Plaintiff GORDON’s New York based personal assistant. (Bluemner Dec. ¶6.) A true and correct copy of a representative email, in which Defendant GORDON was referred to as Plaintiff GORDON’s Los Angeles based personal assistant, is attached to the Declaration of Lotti Bluemner as **Exhibit “A,”** and incorporated herein by this reference as though fully set forth.

**A. A Substantially Similar Action is Already Pending in the Central District of California**

On February 28, 2014, and *approximately a year prior to this action being filed*, Defendant BLUEMNER filed an action, arising out of the same facts and circumstances as this instant action, in the Los Angeles Superior Court, Central District, Stanley Mosk Courthouse, Case Number BC 538111, alleging, among other things, hostile work environment, discrimination, wrongful termination in violation of

1 public policy, intentional infliction of emotional distress, and unfair business practices  
 2 in connection with her employment as Plaintiff GORDON's personal assistant  
 3 (hereinafter referred to as the "California Action.") (Bluemner Dec., ¶8.) A true and  
 4 correct copy of Defendant BLUEMNER's California Action is attached to the  
 5 Declaration of Lotti Bluemner at **Exhibit "B,"** and incorporated herein by this  
 6 reference as though fully set forth. In connection with the California Action, and prior  
 7 to filing the same, Defendant BLUEMNER received a right to sue letter in California.  
 8 (Bluemner Dec., ¶9.) Plaintiff GORDON and ERGO (the named Defendants in the  
 9 California Action,) did not timely appear, and Defendant BLUEMNER took their  
 10 defaults in that action on April 7, 2014 and April 17, 2014, respectively. (Bluemner  
 11 Dec., ¶10.)

12 On October 6, 2014, *and on the last day by which they statutorily could do so*,  
 13 Plaintiffs GORDON and ERGO each filed motions for relief from default in the  
 14 California Action, seeking to set aside the defaults entered against them. (Bluemner  
 15 Dec., ¶11.) Plaintiffs' motions were granted, over Defendant BLUEMNER's  
 16 opposition, on January 27, 2015, after a contested evidentiary hearing held on January  
 17 14, 2015. (Bluemner Dec., ¶11.)

18 **B. The California Action Was Removed to The District Court for the**  
 19 **Central District of California on February 27, 2015, Two Days After This**  
 20 **Action was Filed**

21 On February 27, 2015, *and despite having filed answers to Defendant*  
 22 *BLUEMNER's complaint in connection with their motions from relief from default*,  
 23 *and, once again, on the last day by which Plaintiff GORDON could statutorily do so*,  
 24 Plaintiff GORDON filed a notice of removal, removing the California Action to the  
 25 United States District Court for the Central District of California. (Bluemner Dec.,  
 26 ¶14; see 28 U.S.C. 1446(c)(1).) A true and correct copy of Plaintiff GORDON's  
 27 Notice of Removal in the California Action is attached to the Declaration of Lotti  
 28 Bluemner as **Exhibit "C,"** and incorporated herein by this reference as though fully set

1 forth. The California Action is currently pending in the Central District of Los  
 2 Angeles, case number 2:15-cv-01392 (MMM)(AJWx). (Bluemner Dec., ¶16.)

3 Plaintiff GORDON filed his notice of removal the day *after* his opposition to  
 4 Defendant BLUEMNER's motion for attorneys' fees and costs, brought in connection  
 5 with Plaintiffs GORDON and ERGO's Motions for Relief From Default, was due, and  
 6 was filed for the transparent purpose of divesting the state court of jurisdiction to rule  
 7 on the same. (Bluemner Dec., ¶13.) Defendant BLUEMNER filed a motion for  
 8 remand in the California Action on March 30, 2015 which is currently set for hearing  
 9 on June 15, 2015. (Bluemner Dec., ¶17.)

10 **C. The Court Does Not Have Personal Jurisdiction Over Defendant**  
 11 **BLUEMNER**

12 Plaintiffs' complaint alleges that this court has personal jurisdiction over  
 13 Defendant BLUEMNER because "during Defendant's employment, she was paid by  
 14 direct deposit from...a bank account located in New York," and that "Defendant was in  
 15 regular communication by email and by phone with coworkers in New York" in  
 16 connection with her job duties. (Complaint, Docket No. 1, ¶ 17.) However, neither of  
 17 these alleged actions constitute purposeful contacts with the state of New York relating  
 18 to Plaintiffs' claims, such that this court may exercise jurisdiction over Defendant  
 19 BLUEMNER. Consequently, this court does not have personal jurisdiction over  
 20 Defendant BLUEMNER.

21 **1. The Allegation that Defendant Was Paid From A New York**  
 22 **Account Is Insufficient to Subject her to Personal Jurisdiction in**  
 23 **this Court.**

24 The fact that Plaintiffs' paid Defendant BLUEMNER's salary from a bank  
 25 account in New York does not constitute a purposeful contact *by Defendant*  
 26 *BLUEMNER* sufficient to establish personal jurisdiction over her in this district.  
 27 Rather, Plaintiffs' actions, in paying Defendant from a New York account, is a  
 28 unilateral action of *Plaintiffs*, which cannot be attributed to Defendant for the purposes

1 of establishing jurisdiction. If this were the case, and a court could establish personal  
2 jurisdiction over a Defendant any time a Defendant received a wire transfer, direct  
3 deposit, or, presumably, a simple electronic message of any sort from their employer  
4 with an account located in New York, then virtually every employee of a New York  
5 based company, regardless of their personal contacts with the state of New York, (if  
6 any,) would be subject to the jurisdiction of New York courts for any cause of action  
7 alleged by their employer – an illogical result which does not comport with  
8 constitutional and statutory requirements, which require that a Defendant have  
9 purposeful minimum contacts with a state before they are subject to the court's  
10 jurisdiction.

11 **2. The Allegation that Defendant Made Unrelated Telephone Calls To**  
12 **New York, or Sent Unrelated Email Messages To New York Is Not**  
13 **Sufficient to Exercise Personal Jurisdiction over Her in New York.**

14 While Plaintiffs allege Defendant BLUEMNER made telephone calls and  
15 communicated via email with other employees in New York as part of her job duties,  
16 they fail to allege how such communications relate, (if at all,) to their causes of action.  
17 The fact that Defendant BLUEMNER may have some unrelated contacts with New  
18 York is not enough to exercise personal jurisdiction over her in this action unless those  
19 contacts relate to, or arise out of, Plaintiff's claims. (See New York Civil Practice Law  
20 Section 302.)

21 However, an examination of Plaintiff's claims establish that this is not the case;  
22 rather, Plaintiff's claims are based on actions allegedly taken by Defendant in  
23 California, including, among other things, her alleged use of Plaintiff's car in Los  
24 Angeles, her alleged use of Plaintiff's credit card in Los Angeles, and alleged wrongful  
25 actions taken in connection with Los Angeles realtors. (Complaint, Docket No. 1,  
26 ¶¶25, 77, and 79.) Simply, Plaintiffs' allegations that Defendant BLUEMNER made  
27 some, unrelated telephone calls to New York during her employment with Plaintiffs  
28 GORDON and ERGO, and then, *later* took various allegedly wrongful actions in

1 California which were unrelated to her New York telephone calls, are insufficient to  
2 exercise personal jurisdiction over her in New York.

3 Similarly, while Plaintiffs attempt to argue that Defendant's allegedly  
4 "defamatory" statements, asserted in her complaint in the California Action, allegedly  
5 caused "harm" in the state of New York, such allegations are not sufficient to establish  
6 personal jurisdiction over Defendant BLUEMNER, in this district. Rather, New York  
7 Civil Practice Law Section 302(3) specifically excludes defamation from the "in state  
8 injuries" which subject a defendant to personal jurisdiction. (*See* Complaint, Docket  
9 No 1, ¶¶ 3, 19.)

### 10 **3. The Non-Disclosure Agreement Is Unenforceable and Does Not** 11 **Confer Jurisdiction**

12 Lastly, Plaintiffs allege that the parties expressly agreed, in a "Non-Disclosure  
13 Agreement," that venue would be appropriate in the United States District Court for the  
14 Southern District of New York. (Complaint, Docket No. 1, ¶ 18.) However, for  
15 reasons set forth more thoroughly hereinbelow, the parties' "Non-Disclosure  
16 Agreement" is invalid and unenforceable. As an initial matter, the Non-Disclosure  
17 Agreement (hereinafter "NDA,") was entered into *after* Defendant BLUEMNER began  
18 her employment, and NDA's which are presented to employees after they have begun  
19 their employment are consistently held to be unenforceable. (Bluemner Dec., ¶7.)  
20 (*Dentsply Int'l v. Benton*, 965 F. Supp. 574, 578 (1997) (citing *Spradlin v. Lear Siegler*  
21 *Management Servs. Co.*, 926 F.2d 865 (1991.)) Additionally, the NDA requires that the  
22 parties litigate this matter in a forum which would otherwise be inappropriate;  
23 specifically, the Southern District of the State of New York, and in a court that would  
24 otherwise not have jurisdiction over the matter. Such forum selection clauses, which  
25 select a venue not otherwise proper, have consistently been held to be unconscionable,  
26 and on that basis, void as a matter of public policy. (*Id.*) Thus, the NDA ostensibly  
27 conferring jurisdiction on this court is unenforceable, and cannot be used to establish  
28 personal jurisdiction over Defendant BLUEMNER in this case.



**D. New York is an Improper Venue**

Venue is proper only where (1) the defendant resides, (2) where a substantial part of the events or omissions giving rise to the claim occurred, or (3) where there is no district in which an action may otherwise be brought, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action. 28 U.S. Code 1391. Here, however, Defendant BLUEMNER is a resident of Los Angeles, California. Plaintiff's claims are based on actions allegedly taken by Defendant in connection with actions taken in California, including, among other things, her alleged use of Plaintiff's car in Los Angeles, her alleged use of Plaintiff's credit card in Los Angeles, and alleged wrongful actions taken in connection with Los Angeles realtors. (Complaint, Docket No. 1, ¶¶25, 77, and 79.) Finally, as argued hereinabove, Defendant BLUEMNER is not subject to this court's personal jurisdiction, as she does not have sufficient relevant contacts with the state of New York to impose personal jurisdiction on her in this court. For these reasons, as more thoroughly set forth herein, venue is not proper in this district. Accordingly, Defendant BLUEMNER respectfully requests that her Motion to Dismiss be granted, or, alternatively, that this action be transferred to the Central District of California.

**II. THE CAUSES OF ACTION ALLEGED IN THIS ACTION CONSTITUTE COMPULSORY COUNTER CLAIMS WHICH WERE REQUIRED TO BE BROUGHT, IF AT ALL, IN THE CALIFORNIA ACTION**

Furthermore, there is already a similar, related action pending in the District Court for the Central District of California, and allowing Plaintiffs to fragment this case by filing what amount to "compulsory counter claims" in a separate action in this court, more than a year after the California Action was filed, is judicially inefficient, risks incompatible judgments, and is prejudicial to Defendant BLUEMNER, who has no contacts with the state of New York.

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**A. Plaintiffs' Claims Arise Out of the Same Facts and Circumstances as The California Action**

Two (2) days prior to filing a Notice of Removal in the California Action, and while the California Action was still pending in the Los Angeles Superior Court, Plaintiffs filed this instant action. (Bluemner Dec., ¶14.) Importantly, Plaintiffs GORDON and ERGO, together with Plaintiff CEE GEE CEE, LLC ("Plaintiff CEE GEE CEE,") filed this instant action after Plaintiffs GORDON and ERGO's motions for relief from default had been granted, and after their answers were filed in that action. (Bluemner Dec., ¶12.)

The first four (4) causes of action alleged herein, namely: (1) breach of contract, (2) breach of duty of loyalty, (3) tortious interference with contractual relations, and (4) conversion, all arise out of the same facts and circumstances as the California Action, namely, Defendant BLUEMNER's employment with Plaintiffs ERGO and GORDON, and her termination therefrom. Moreover, Plaintiffs' last two (2) causes of action, defamation and intentional infliction of emotional distress, arise out of, and are based upon, the California Action itself, in which Defendant BLUEMNER alleges several embarrassing facts concerning Plaintiff GORDON's lifestyle, including his alleged use of illegal drugs. (Bluemner Dec., ¶8, **Exhibit "B."**) Consequently, the causes of action alleged herein by Plaintiffs were and are compulsory counter claims which must be brought in the California Action, if at all. (*See Federal Rule of Civil Procedure*, Rule 13(a); *California Code of Civil Procedure* Section 426.30.)

**B. Plaintiffs' Claims Constitute Compulsory Counter Claims**

The claims alleged by Plaintiffs in this action are compulsory counter-claims, in that they arise out of the same transactions or occurrences as Defendant BLUEMNER's claims in the California Action, and are logically related thereto. Many of the facts and circumstances addressed in Plaintiffs' complaint, here, are also central to Defendant BLUEMNER's California Action, including, among other things, her alleged use of Plaintiff GORDON's vehicles, her alleged use of Plaintiff GORDON's



1 credit cards, and her business relationship with Los Angeles realtors, in connection  
 2 with her search, as part of her job duties, to locate a Los Angeles home for Plaintiff  
 3 GORDON. (See Bluemner Dec., **Exhibit “B;”** Complaint, Docket No. 1, ¶¶25, 77,  
 4 and 79.) Plaintiffs’ claims regarding those same events were thus required to be  
 5 brought in the California Action, and not in a separate action, especially after Plaintiffs  
 6 GORDON and ERGO had already answered Defendant BLUEMNER’s complaint in  
 7 the California Action. (See Federal Rule of Civil Procedure, Rule 13(a); California  
 8 Code of Civil Procedure Section 426.30 [“if a party against whom a complaint has been  
 9 filed and served fails to allege in a cross-complaint any related cause of action  
 10 which...he has against the plaintiff, such party may not thereafter in any other action  
 11 assert against the plaintiff the related cause of action not pleaded.”])

12 Plaintiffs GORDON and ERGO filed this action without notifying Defendant  
 13 BLUEMNER, or her counsel in the California Action, and without even attempting to  
 14 bring such claims in the already pending California Action, despite the fact that  
 15 Plaintiffs GORDON and ERGO were actively participating in that case, and had, as of  
 16 January 27, 2015, filed answers therein. (Bluemner Dec., ¶15.)

17 Instead of bringing their claims in the pending California Action, and in an  
 18 obvious attempt to “forum shop” for the benefit of Plaintiffs GORDON and ERGO,  
 19 Plaintiffs chose to file this separate action in New York. Plaintiff GORDON’s and  
 20 Plaintiff ERGO’s gamesmanship in fractionalizing and splintering this case into a bi-  
 21 coastal litigation pending in several courts, simultaneously, is not in the best interests  
 22 of the parties, or either court, and risks multiple, duplicitous, or worse, conflicting  
 23 rulings on the rights and liabilities of these parties with respect to this dispute, and,  
 24 moreover, does not respect the principal of judicial economy, and burdens this court  
 25 with a dispute already pending, and being adjudicated, in another jurisdiction.

26 ///

27 ///

28 ///

**C. Defendants' statements in the California Action are Protected by the Litigation Privilege.**

For reasons of public policy, certain defamatory communications enjoy an absolute or qualified privilege, so that they fall outside the general rules imposing liability for defamation. *Toker v. Pollak*, 44 N.Y.2d 211 (1978). New York has traditionally accorded an absolute privilege to oral or written communications made in the course of judicial proceedings and which relate to the litigation. *Herzfeld & Stern v. Beck*, 175 A.D.2d 689, 572 N.Y.S.2d 683 (1st Dept.1991); *Mosesson v. Jacob D. Fuchsberg Law Firm*, 257 A.D.2d 381, 683 N.Y.S.2d 88 (1st Dept.1999) The privilege attaches not only at the trial or hearing phase, but to every step of the proceeding in question. The complete immunity for such statements is predicated on the public interest in the freedom of participants to "speak with that free and open mind which the administration of justice demands." *Youmans v. Smith*, 153 N.Y. 214, 47 N.E. 265 (1897). The rationale for according an absolute privilege to such statements has been explained as follows:

*"The interest of society requires that whenever [persons] seek the aid of the courts of justice, either to assert or to defend rights of person, property, [or] liberty, speech and writing therein must be untrammelled and free. The good of all must prevail over the incidental harm to the individual. So the law offers a shield to the one who in legal proceedings publishes a libel, not because it wishes to encourage libel, but because if [persons] were afraid to set forth their rights in legal proceedings for fear of liability to libel suits, greater harm would result, in the suppression of the truth. The law gives to all who take part in judicial proceedings, judge, attorney, counsel, printer, witness, litigant, a right to speak and to write, subject only to one limitation, that what is said or written bears upon the subject of litigation."*

*Allan and Allan Arts Ltd. v. Rosenblum*, 201 A.D.2d 136, (2d Dep't 1994). See also *Front, Inc. v. Khalil*, 103 A.D.3d 481 (1st Dep't 2013), leave to appeal granted, 22 N.Y.3d 859, 981 N.Y.S.2d 369, 4 N.E.3d 381 (2014).

Here, Defendant BLUEMNER's allegations in the California Action are absolutely privileged under the litigation privilege conferred by New York law. Thus,

1 Plaintiffs cause of action for Defamation, based solely on the allegations contained in  
 2 Defendant BLUEMNER's California Action, are insufficient to state a cause of action  
 3 for defamation, as all such allegations are absolutely privileged, and cannot support a  
 4 claim of defamation.

5 **D. Plaintiffs Filed This Separate Action to Prejudice Defendant BLUEMNER**

6 Moreover, requiring Defendant BLUEMNER to litigate, simultaneously, in two  
 7 (2) separate circuit courts is extremely prejudicial to Defendant, who is a single mother  
 8 to an infant child, and who lives exclusively in Los Angeles, California. (Bluemner  
 9 Dec., ¶3.) Specifically, it prevents Defendant BLUEMNER from reasonably and  
 10 judiciously litigating her claims against Plaintiff ERGO and GORDON, by requiring  
 11 her to litigate essentially the same case in the District Courts of California and New  
 12 York, simultaneously. This was, presumably, the reason why Plaintiffs chose to bring  
 13 their claims in this court, and not in the California Action; however, such  
 14 gamesmanship and blatant "forum shopping" is prohibited by the Federal Rules of  
 15 Civil Procedure, and on that basis, Plaintiffs' case should be dismissed, or,  
 16 alternatively, transferred to the United States District Court of and for the Central  
 17 District of California, so that they can be heard together with Defendant  
 18 BLUEMNER's related claims already pending therein.

19 **III. THIS COURT LACKS PERSONAL JURISDICTION OVER DEFENDANT**  
 20 **AND VENUE IS IMPROPER IN NEW YORK**

21 This court lacks jurisdiction over Defendant BLUEMNER, and for that reason,  
 22 this action should be dismissed. Defendant BLUEMNER lacks sufficient minimum  
 23 contacts with the state of New York for this court to exercise personal jurisdiction over  
 24 her, and the parties' NDA is unenforceable and void as a matter of public policy. For  
 25 the foregoing reasons, Defendant BLUEMNER respectfully requests that the court  
 26 grant her motion to dismiss, or alternatively, that this action be transferred to the  
 27 Central District of California.

28 ///

**A. This Court Lacks Personal Jurisdiction Over Defendant BLUEMNER**

In order to exercise personal jurisdiction over a Defendant, the Plaintiff must establish that the Defendant has satisfied the state's long-arm statute, and the assertion of jurisdiction over the Defendant must comport with constitutional due process standards. (*Barrett v. Lombardi*, 239 F.3d 23, 26 (2001.))

**1. Plaintiffs have not established that New York's Long Arm Statute is Satisfied**

New York's long arm statute, New York Civil Practice Law Section 302, provides that the court may exercise personal jurisdiction over a non-domiciliary only where the Defendant: (1) transacts any business within the state...(2) commits a tortious act within the state, or (3) commits a tortious act outside the state causing injury to person or property within the state. Importantly, section 302 specifically excludes cause of action for "defamation" from the statute's section regarding "tortious act committed within or outside the court," stating that such "defamatory" statements published outside the forum, do not confer jurisdiction over the Defendant.

Here, the only "tortuous acts" alleged by Plaintiffs concern either defamation, which is, as stated above, expressly excluded from the long arm statute's reach, or actions which occurred exclusively in California, such as alleged "kick-backs" taken from California realtors, alleged improper use of Plaintiff's credit card in California, and alleged unauthorized use of Plaintiff's vehicles in California. (Complaint, Docket No. 1, ¶¶25, 77, and 79.) Simply, Plaintiffs have not alleged that Defendant conducts any regular activities in New York, has any regular contacts or connections with New York, or that she caused any proximate harm in the state of New York. Plaintiffs admit as such by alleging that Defendant BLUEMNER was hired to be Plaintiff GORDON's *Los Angeles based* personal assistant, and was responsible for, predominantly, maintaining his Beverly Hills residence. (Complaint, Docket No. 1, ¶22.) While Plaintiffs allege that Defendant BLUEMNER had some unrelated contacts in New York, such as communicating, periodically, as part of her job duties, with other, New

1 York based employees, Plaintiffs do not allege or explain how Defendant's periodic  
 2 communications with New York employees relates to her allegedly tortuous conduct, if  
 3 at all. Therefore, Plaintiffs have not satisfied the requirements of the New York long  
 4 arm statute, and this court does not have personal jurisdiction over Defendant  
 5 BLUEMNER in this case.

## 6 **2. Plaintiffs have Not Established that Constitutional Due Process Has Been** 7 **Satisfied**

8 Constitutional due process requires the plaintiff to prove the existence of either  
 9 general or specific jurisdiction. *Harlow v. Children's Hosp.*, 432 F.3d 50, 57 (1<sup>st</sup> Cir.  
 10 2005.) To satisfy the due process requirements, the defendant must first have sufficient  
 11 "minimum contacts" with the state. To confer specific jurisdiction, the plaintiff's claim  
 12 must be related to the defendant's contacts, a Plaintiff cannot rely on unrelated or  
 13 incidental contacts to establish jurisdiction. Second, the defendant's contacts with the  
 14 state must be purposeful. And third, the exercise of jurisdiction must be reasonable  
 15 under the circumstances. *See Cambridge Literary Props., Ltd. v. W. Goebel*  
 16 *Porzellanfabrik G.m.b.H & Co. Kg.*, 295 F.3d 59, 63 (1<sup>st</sup> Cir.2002.) The general  
 17 standard is whether the nonresident defendant possesses sufficient contacts with the  
 18 forum state so that subjecting him, her, or it to the forum's jurisdiction does not offend  
 19 "traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*,  
 20 326 U.S. 310, 316 (1945.) "[P]laintiff[s] ultimately bear[ ] the burden of persuading  
 21 the court that jurisdiction exists." *Mass. Sch. of Law at Andover, Inc. v. American Bar*  
 22 *Association*, 142 F.3d 26, 34 (1998.) "[P]laintiffs may not rely on unsupported  
 23 allegations in their pleadings," but are "obliged to adduce evidence of specific facts."  
 24 *Boit v. Gar-Tec Products, Inc.*, 967 F.2d 671, 675 (1992); *Foster-Miller, Inc. v.*  
 25 *Babcock & Wilcox Can.* 46 F.3d 138, 145 (1<sup>st</sup> Cir.1995.)

26 Plaintiffs have the burden to persuade the court that jurisdiction exists, and have  
 27 fallen woefully short of meeting that burden here. *Mass. Sch. of Law* at 34. Defendant  
 28 is, and at all relevant times has been, a resident of the State of California. Her



1 employment services for Plaintiffs were performed in California, and she has never  
 2 conducted any business within the state of New York. (Bluemner Dec., ¶3.) Plaintiffs  
 3 allege only two alleged “contacts” Defendant has with New York: her unrelated  
 4 periodic emails or telephone calls to persons in New York in connection with her job  
 5 duties, and the fact that Defendant was allegedly paid from Plaintiff’s New York bank  
 6 account, which is also unrelated to the allegations made in Plaintiffs’ complaint.  
 7 However, both of these purported “contacts” are insufficient to establish jurisdiction  
 8 over Defendant BLUEMNER.

9 i. Related Contacts

10 With respect to the first “prong,” establishing contacts with the forum state  
 11 which are related to the cause(s) of action, the evidence produced to support specific  
 12 jurisdiction must show that the cause of action either arises directly out of, or is related  
 13 to, the defendant's forum-based contacts. *United Elec., Radio & Mach. Workers v. 163*  
 14 *Pleasant St. Corp.*, 960 F.2d 1080, 1088-1089 (1992.) The relatedness requirement is  
 15 not an open door; it is closely read, and it requires a showing of a material connection.  
 16 The Federal courts “steadfastly reject the exercise of personal jurisdiction whenever the  
 17 connection between the cause of action and the defendant's forum-state contacts seems  
 18 attenuated and indirect.” *Id.* at 1089. “Instead, the defendant's in-state conduct must  
 19 form an ‘important, or [at least] material, element of proof’ in the plaintiff's case.” *Id.* A  
 20 broad “but-for” argument is generally insufficient. Because “‘but for’ events can be  
 21 very remote...due process demands something like a ‘proximate cause’ nexus.”  
 22 *Cambridge Literary Props. v. W. Goebel Porzellanfabrik G.m.b.H & Co. Kg.*, 295 F.3d  
 23 59, 65 (2002.) Although “strict adherence to a proximate cause standard in all  
 24 circumstances is unnecessarily restrictive,” in most cases “the proximate cause standard  
 25 better comports with the relatedness inquiry because it so easily correlates to  
 26 foreseeability, a significant component of the jurisdictional inquiry.” *Nowak v. Tak*  
 27 *How Invs., Ltd.*, 94 F.3d 708, 715 (1st Cir.1996.)

28 Here, all the causes of action alleged by Plaintiffs against Defendant



1 BLUEMNER relate to Defendant's activities in California, such as her alleged use of  
 2 Plaintiff GORDON's vehicle, her alleged impropriety concerning Plaintiff GORDON's  
 3 Los Angeles realtors, her alleged unauthorized use of Plaintiff GORDON's credit card,  
 4 and the allegedly defamatory statements contained in the complaint filed in the  
 5 California Action. (Complaint, Docket No. 1, ¶¶25, 77, and 79.) The only purposeful  
 6 contacts alleged by Plaintiffs to have occurred in New York are Defendant  
 7 BLUEMNER's periodic telephone calls, or email correspondence, to New York based  
 8 employees made during the course of her employment. However, Plaintiffs fail to  
 9 allege how such email or telephone correspondence relates to Plaintiff's claims, let  
 10 alone establish the "proximate cause nexus" required to establish personal jurisdiction.

11 ii. Purposeful Contacts

12 In addition to being "related" to Plaintiffs' claims, Defendant's contacts with the  
 13 forum must be purposeful, i.e. actions taken to intentionally avail herself of the  
 14 privileges and protections conferred by that jurisdiction. *Hanson v. Denckla*, 357 U.S.  
 15 235, 253 (1958.) Here, Plaintiffs allege that Defendant BLUEMNER was paid by  
 16 Plaintiffs from a bank account located in New York. (Complaint, Docket No. 1, ¶17.)  
 17 However, Plaintiffs fail to allege how Defendant BLUEMNER being paid *from*  
 18 *Plaintiffs* can be attributed to her purposeful action or choice, especially where, as here,  
 19 Plaintiffs have failed to allege that Defendant was even aware of the bank account from  
 20 which her pay checks were distributed, or the fact that it was located in New York.

21 In *Harlow v. Children's Hosp.*, 432 F.3d 50, 63 (2005,) the first circuit addressed  
 22 the specific issue of whether receipt of payment generated from an in-forum bank  
 23 account was sufficient to confer personal jurisdiction over the Defendant in that forum.  
 24 There, the court held that merely receiving funds from a bank account in the forum  
 25 state was not sufficient to confer personal jurisdiction over the Defendant, and that a  
 26 more purposeful contact with the forum state was required. In *Harlow*, the Plaintiff, a  
 27 patient at the Defendant hospital, sued the Massachusetts based hospital in her home  
 28 state of Maine, alleging that, because she had paid the hospital from insurance proceeds

1 sent from Maine, the hospital was subject to personal jurisdiction in Maine. (Id.) The  
2 court disagreed, holding that the

3  
4 *“unilateral activity of those who claim some relationship with a nonresident*  
5 *defendant [such as the sending of payment,] cannot satisfy the requirement*  
6 *of contact with the forum State. The application of that rule will vary with*  
7 *the quality and nature of the defendant's activity, but it is essential in each*  
8 *case that there be some act by which the defendant purposefully avails itself*  
9 *of the privilege of conducting activities within the forum State, thus*  
10 *invoking the benefits and protections of its laws.”*

11 (Id., citing *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).)

12 The *Harlow* court instructs that simply receiving funds from a party in the forum  
13 state does not subject the Defendant to jurisdiction there, as such contact is more  
14 properly considered the unilateral action of the sending party, and not a purposeful  
15 contact with the forum state by the Defendant which could reasonably and fairly confer  
16 personal jurisdiction on the Defendant. Thus, in the absence of any purposeful  
17 availment by Defendant BLUEMNER of the privileges of this forum, the mere fact that  
18 her paychecks were sent, *by Plaintiffs*, from New York, is not sufficient to establish  
19 personal jurisdiction over Defendant BLUEMNER in this case.

20 iii. Fair And Reasonable Exercise of Jurisdiction

21 The final “prong” analyzed with respect to the exercise of personal jurisdiction is  
22 whether imposing jurisdiction over the Defendant would be fair and reasonable. Here,  
23 Defendant BLUEMNER, a California resident, has had only fleeting, unrelated contact  
24 with the state of New York, and exercise of jurisdiction over her in this action would  
25 be unreasonable, especially in light of the fact that a similar action, arising out of these  
26 same facts, is already pending in California. Requiring Defendant BLUEMNER to  
27 defend in this action, while also prosecuting a similar action in Los Angeles, would  
28 impose a significant burden upon her, which would be unfair and unreasonable under  
the circumstances.

1 In analyzing the concept of a fair and reasonable exercise of jurisdiction, the  
 2 court generally analyzes seven factors. Those factors are: (1) the extent of the  
 3 defendant's purposeful avilment of the benefit of a forum; (2) the burden on the  
 4 defendant to litigate in that forums; (3) the extent of conflict with the defendant's  
 5 sovereign state; (4) the forums interests in hearing the dispute; (5) the most efficient  
 6 forum for judicial resolution of a dispute; (6) the importance of the forum to plaintiff's  
 7 interest in convenient and effective relief; and (7) the existence of an alternative forum.  
 8 See: *Gator.com Corp. v. L.L.Bean, Inc., supra.*; *Dole Food Company, Inc. v. Watts*,  
 9 303 F.3d 1104 (CA 9<sup>th</sup> CAL 2002); *Panivision Intern, L.P. v. Toeppen, supra.*

10 Here, Defendant BLUEMNER has made no purposeful avilment of the benefits  
 11 or protections of New York law; she has conducted no business in this state, and her  
 12 contacts with this forum consist of: (1) communicating periodically with persons  
 13 located in New York via email or telephone, which contacts are unrelated to the alleged  
 14 harm asserted in this action, and (2) receiving paychecks drawn on a New York bank  
 15 account, which, also, is not relevant to Plaintiffs' claims. (Complaint, Docket No. 1, ¶  
 16 17.) Additionally, it would be a significant burden and expense for Defendant  
 17 BLUEMNER to have to defend herself in this forum, especially since she is already  
 18 litigating a case involving substantially the same parties, and involving the same facts,  
 19 in Los Angeles, California. Furthermore, as all of Plaintiffs' claims involve actions  
 20 and events occurring in California, the New York courts have no significant interest in  
 21 hearing this dispute, and fractionalizing these parties' claims across two (2) separate  
 22 districts risks duplicitous or incongruous rulings. The more efficient and convenient  
 23 forum for hearing this dispute in California, where the California Action is already  
 24 pending.

25 The Plaintiffs' complaint wholly fails to satisfy the requirements of *in personam*  
 26 jurisdiction against Defendant BLUEMNER. Accordingly, Defendant BLUEMNER  
 27 respectfully request that her motion to dismiss the complaint for lack of personal  
 28 jurisdiction be granted.

1           **3. The Forum-Selection Clause in the Non-Disclosure Agreement is not**  
 2           **Enforceable**

3           A forum selection clause is unenforceable if the execution of the contract or the  
 4 specific provision in the contract involved a fraudulent action by one party amounting  
 5 to unequal bargaining position, fundamental unfairness, or unconscionability, or if  
 6 enforcement would contravene a strong public policy of the forum in which suit is  
 7 brought, whether declared by statute or by judicial decision. *Doe I v. AOL LLC*, 552  
 8 F.3d 1077 (9th Cir. 2009); *Nearburg v. Yates Petroleum Corp.*, 123 N.M. 526, 537  
 9 (1997.) Here, the NDA agreement executed by and between Plaintiff GORDON and  
 10 Defendant BLUEMNER is unenforceable, as Plaintiff GORDON requested Defendant  
 11 BLUEMNER execute the NDA after she had already started working for Plaintiff  
 12 GORDON, in and around May, 2012, and she felt compelled to sign it for fear of losing  
 13 her job if she refused. (Bluemner Dec. ¶7.)

14           Federal courts have consistently held that forum-selection clauses in employment  
 15 contracts, executed *after* the employment has begun, are unenforceable because “the  
 16 pressure to “preserve” a job a person already ha[s] render[s] the employee-employer  
 17 relationship so inherently unequal that we would not enforce a forum selection clause  
 18 in the employment agreement the employee executed with his new employer.” *Dentsply*  
 19 *Int'l v. Benton*, 965 F. Supp. 574, 578 (1997) (citing *Spradlin v. Lear Siegler*  
 20 *Management Servs. Co.*, 926 F.2d 865 (1991.)) Moreover, the court in *Dentsply* noted  
 21 that an NDA agreement executed after an employee has already started work need not  
 22 be executed under “duress” to be held unconscionable; rather, all that is required is to  
 23 show that the employer’s “conduct would not have led an employee to believe he could  
 24 negotiate the agreement.” *Id.* at 579-580. Here, like in *Dentsply*, the circumstances in  
 25 which the NDA was presented to Defendant BLUEMNER further support the finding  
 26 that the NDA is unconscionable and unenforceable. The Agreement was presented to  
 27 Defendant after she had already begun her employment with Plaintiffs GORDON and  
 28 ERGO. (Bluemner Decl. ¶7.) Defendant understood the Agreement to be one of the

requirements for her employment with Plaintiff GORDON, and she signed it in order to keep her job. (Bluemner Decl. ¶7.) Resultantly, the NDA is unconscionable, as it was executed under unequal bargaining power, and by a Defendant who understood that she did not have a choice in its execution. Consequently, the NDA is unconscionable and should not be enforced to confer jurisdiction in this case.

**B. Venue Is Inappropriate in the Southern District of New York**

28 U.S. Code 1391 provides that venue is proper in a judicial district where (1) the defendant resides, (2) where a substantial part of the events or omissions giving rise to the claim occurred, or (3) if there is no other district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action. If the venue-selection clause of a contract contemplates filing the action in an inappropriate venue, the Federal Court may dismiss the action under Federal Rules of Civil Procedure 12(b)(3). The Court may also transfer the action to an appropriate venue, pursuant to 28 U.S.C.A. § 1406 which provides, in relevant part: "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." Here, venue is improper, and thus this action should be dismissed, or, alternatively, transferred to the Central District of California, where the California Action is currently pending.

**1. All of Plaintiffs Claims Concern Actions Occurring In Los Angeles, California**

Here, Venue is not proper in the Southern District of New York, as Defendant is a resident of California, and all the events giving rise to Plaintiffs' claims occurred in California, or arise out of actions taken in California. (*See* Complaint, Docket No. 1, ¶¶25, 77, and 79.) Specifically, Plaintiffs' first cause of action, breach of contract, arises out of the NDA, which was executed in California, and which concerns Defendant BLUEMNER's employment in California. (Bluemner Decl. ¶¶ 6-7.)



1 Similarly, the second, third, and fourth causes of action arise out of Defendant's  
2 alleged wrongful conduct in the performance of her duties during her employment for  
3 Plaintiffs in California, including: (a) allegedly impermissibly driving Plaintiffs'  
4 vehicles in Los Angeles, (b) allegedly utilizing Plaintiffs' credit card without  
5 permission, (c) allegedly failing to return a computer allegedly used in connection with  
6 her employment in Los Angeles, after her termination, and (d) allegedly conspiring to  
7 receive "kick-backs" concerning a contemplated Los Angeles real-estate purchase.  
8 (See Complaint, Docket No. 1, ¶¶25, 77, and 79.) Finally, Plaintiffs' final two causes  
9 of action, for defamation and intentional infliction of emotional distress, arise out of  
10 and are based upon statements made by Defendant BLUEMNER in her complaint in  
11 the California Action, and were published in Los Angeles, California. (Bluemner Decl.  
12 ¶ 8.)

13 The only allegations made by Plaintiffs with respect to actions taken by  
14 Defendant BLUEMNER in New York concern her unrelated telephone calls and  
15 emails, and the unrelated fact that Defendant was paid by direct deposit from a bank in  
16 New York. (Complaint, Docket No. 1, ¶ 17.) However, such allegations are  
17 immaterial to the determination of venue, as these facts have no bearing or relationship  
18 to Plaintiffs' claims.

19 **2. Plaintiffs' Defamation Claims Cannot Be Used to Establish Venue in the**  
20 **Southern District of New York**

21 Plaintiffs also attempt to establish venue by alleging that Plaintiffs' suffered  
22 harm in this district as a result of Defendant BLUEMNER's allegedly defamatory  
23 statements made in the complaint in the California Action. As an initial matter,  
24 Plaintiffs' unsupported legal conclusion that "damage to Gordon's reputation" occurred  
25 in New York should not be used as a basis for establishing venue in this case, as  
26 Plaintiffs admit Plaintiff GORDON is a resident of Florida, and do not allege how, or  
27 why, Plaintiff GORDON's reputation could be harmed in the state of New York, or,  
28 more specifically, how Defendant BLUEMNER's statements, made the context of



1 litigation pending in California, could reasonably affect his reputation across the  
2 county, in New York (or in Florida.)

3 Additionally, and setting aside the unsupported and simply illogical conclusory  
4 assertions stated in Plaintiff's complaint with respect to Plaintiff GORDON's purported  
5 injuries in New York as a result of Defendant BLUEMNER's allegedly defamatory  
6 statements in California, New York case law makes clear that defamation actions  
7 should be litigated in the forum in which the statements were published, and not where  
8 the harm occurred, *even if* the Plaintiff resides in a different county. *Konigsberg v.*  
9 *Long Island Daily Press Pub. Co.*, 293 N.Y.S.2d 861 (Sup 1968). Resultantly,  
10 Plaintiffs' defamation claims cannot be used to establish proper venue in New York.

11 For example, in *Konigsberg v. Long Island Daily Press Pub. Co.*, 293 N.Y.S.2d  
12 861 (Sup 1968), the New York supreme court held that defamation actions should be  
13 tried in the county where the statement was published, and not in the county where the  
14 Plaintiff resided at the time of publication, even if some copies of the statement were  
15 circulated in the Plaintiff's county.

16  
17 *"The mere fact, that a small percentage of the total number of copies of the*  
18 *newspaper is circulated in the county selected by plaintiff, is insufficient to oppose a*  
19 *motion to change the venue to the county where the paper is actually published and*  
20 *most of its copies circulated. This would be so even if, at the time of the*  
21 *commencement of this action, plaintiff resided and had a place of business in the*  
22 *county where the action was commenced."*

23 *Konigsberg v. Long Island Daily Press Pub. Co.*, 293 N.Y.S.2d 861 (Sup 1968)  
24 (quoting *Police Benevolent Association of New York State Police v. Post-Standard*  
25 *Company*, 244 N.Y.S.2d 645 (1963).)

26 Here, Plaintiffs' complaint alleges that Defendant BLUEMNER's allegedly  
27 defamatory statements were made in her complaint in the California Action, and were  
28 therefore published in Los Angeles, California. Resultantly, the proper venue for

1 Plaintiff's claims is Los Angeles, the venue in which the statements were published,  
2 and Defendant BLUEMNER resides, and not in New York, as Plaintiffs allege.

3 **C. New York is Not a Convenient Forum**

4 The doctrine of *forum non conveniens* rests upon the principle that a Court may  
5 resist imposition of its jurisdiction upon a Defendant when the matter before it may be  
6 more conveniently tried in another forum. See: *Hamilton v. Firestone Tire and Rubber*  
7 *Company, Inc.*, 679 F.2d. 143 (CA 9<sup>th</sup> CAL 1982).

8 In determining whether to dismiss an action for *forum non conveniens*, the Court  
9 must consider both private interest factors effecting the convenience of the litigants,  
10 including all practical problems that will make the trial easy, expeditious, and  
11 inexpensive, as well as any public interest factors that weigh in favor of resolution in  
12 one venue or another. (*Id.*) Courts have taken a flexible approach in addressing *forum*  
13 *non conveniens*, considering such factors as: (1) the burden on New York courts, (2)  
14 the hardship for the defendant, (3) the delay in bringing the motion, (4) whether the  
15 plaintiff has an alternative forum, (5) whether there is a separate related action in a  
16 foreign jurisdiction, (6) to what degree the cause of action arose in a foreign  
17 jurisdiction, (7) whether foreign law will apply, and (8) whether the parties are New  
18 York residents. *Turay v. Beam Bros. Trucking, Inc.*, 878 N.Y.S.2d 391, 393 (2d Dep't  
19 2009); *Genicom Corp. v. Ekco Group*, 554 N.Y.S.2d 202, 203 (1st Dep't 1990);  
20 *Highgate Pictures, Inc. v. De Paul*, 549 N.Y.S.2d 386, 387–88 (1st Dep't 1990); *Brown*  
21 *v. Dataw Island Realty, Inc.*, 542 N.Y.S.2d 99, 100 (4th Dep't 1989) ; *West Broward*  
22 *Group, LLC v. Independence Community Bank Corp.*, 823 N.Y.S. 2d 646, 648 (2006);  
23 *Economos v. Zizikas*, 796 N.Y.S.2d 338, 340 (1st Dep't 2005).

24 Here, all of the factors generally considered by the court in connection with a  
25 *forum non conveniens* analysis weigh in favor of dismissing this action, or transferring  
26 it to a different venue. Requiring Defendant BLUEMNER to litigate this case in New  
27 York would be a significant burden and expense for her, especially since she is already  
28 litigating a case involving substantially the same parties, and involving the same facts,

1 in Los Angeles, California. Furthermore, as all of Plaintiffs' claims involve actions  
2 and events occurring in California, the New York courts have no significant interest in  
3 hearing this dispute. This is especially true since the California courts are already  
4 adjudicating the California Action, which has been pending for more than a year.  
5 Judicial economy dictates that the California court adjudicate this entire dispute, rather  
6 than require two separate courts to resolve this action on a piecemeal basis.  
7 Additionally, having the entire action heard in California reduces the likelihood of the  
8 issuance of two, conflicting or duplicitous judgments. Finally, all of the claims alleged  
9 on Plaintiffs complaint involve actions allegedly taken by Defendant BLUEMNER in  
10 California, and so the California court has a greater interest in resolving this dispute,  
11 and having these issues litigated where they occurred would not only be reasonable but  
12 would result in a great savings and economy to the parties and to the Courts.  
13 Defendant BLUEMNER therefore respectfully requests that this matter be dismissed  
14 or, alternatively, transferred to the United States District Court in and for the Central  
15 District of California on the basis of forum *non conveniens*.

16 **IV. CONCLUSION**

17 Based on the foregoing, as set forth herinabove, specially appearing Defendant  
18 BLUEMNER respectfully requests that the court grant the relief requested herein and  
19 dismiss Plaintiffs Complaint, or in the alternative, transfer this action to the United  
20 District Court located for the Central District of California.

21 Dated: April 1, 2015

22  
23 

24 \_\_\_\_\_  
25 LOTTI BLUEMNER  
26 *In Propria Persona*  
27  
28